STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 21, 2005
v	No. 251428 Livingston Circuit Court
RYAN KENDRICK NICHOLS, Defendant-Appellant.	LC No. 02-012889-FC

Before: Fort Hood, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of kidnapping, MCL 750.349, assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to concurrent prison terms of fifteen to forty years for the kidnapping conviction and six to ten years for the assault conviction. Defendant received a consecutive two-year sentence for the felony firearm conviction. We affirm defendant's convictions and his sentences but remand for the ministerial task of filing the completed sentencing information report for defendant's kidnapping conviction.

Lynea Emmons, the victim, was confined and viciously beaten by defendant, her boyfriend, for approximately five hours in the basement of the home they shared.[1]

Defendant first argues that the trial court erred in denying his motions for a directed verdict with regard to the kidnapping and assault charges. We disagree.

We review a trial court's decision concerning a motion for a directed verdict "de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

[1] Emmons and defendant shared sleeping quarters in the basement of defendant's mother's house.

The kidnapping statute contemplates two kinds of confinement: forcible and secret. *People v Jaffray*, 445 Mich 287, 297; 519 NW2d 108 (1994). It is secret confinement that is at issue here. The elements of secret confinement kidnapping are: (1) the victim must have been forcibly confined or imprisoned, (2) the victim must have been confined against his will and without lawful authority, (3) during the course of such confinement the defendant must have kept the victim's location secret, (4) the defendant must have intended the confinement to be secret, and (5) at the time of the secret confinement the defendant must have been acting willfully and maliciously. See CJI2d 19.4. In *Jaffray*, our Supreme Court said that "the essence of 'secret confinement' as contemplated by the statute is deprivation of the assistance of others by virtue of the victim's inability to communicate his predicament." *Jaffray, supra* at 309.

The evidence, viewed in the light most favorable to the prosecutor, demonstrates that Emmons' confinement was forcible and against her will. Defendant hog-tied Emmons, blindfolded her with an icepack, repeatedly choked her with a belt, stuffed her mouth with socks and taped it shut, and threatened her with a gun.

The evidence also demonstrates that defendant intended to keep Emmons' confinement and location secret. He stuffed her mouth with socks so that his mother, who was upstairs throughout the confinement, would not hear Emmons' screams. Defendant also prevented Emmons from speaking to her brother on the telephone when he called during the confinement. Defendant told Emmons' brother that she was unable to come to the telephone and hung up the receiver. Defendant's mother and Emmons' brother testified that they did not know that Emmons was being confined by defendant in the basement.

Further, the aforementioned evidence demonstrates that defendant acted willfully and maliciously during the confinement. Thus, the trial court properly denied defendant's motion for a directed verdict with respect to the kidnapping charge.[2]

Likewise, the evidence, viewed in the light most favorable to the prosecutor, demonstrates that defendant assaulted Emmons with the requisite intent to do great bodily harm less than murder. See MCL 750.84. Defendant beat Emmons for nearly five hours. The beating included blows to the head, face, and abdomen, and resulted in a dislocated shoulder. Defendant beat Emmons to unconsciousness twice, and he held her head to a scalding hot heater, leaving a scar still visible at time of trial. Defendant also wrapped a belt around Emmons' neck to choke

[2] Defendant cursorily mentions in his brief on appeal that the secret confinement statute, MCL 750.349, is unconstitutional. Defendant has waived this issue, however, by failing to list it as part of his questions presented for appeal. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Defendant has additionally waived his cursory argument that the trial court erred in denying a directed verdict with respect to the felony-firearm charge. Indeed, this issue is not included in the statement of questions presented for appeal and is not adequately briefed. *Id.*; *People v Kevorkian*, 248 Mich App 373; 388 n 30; 639 NW2d 291 (2001). Although defendant's brief is not entirely clear, it appears that defendant may also be arguing that the trial court erred in failing to quash the information as applied to the felony-firearm charge. This argument is inadequately briefed and is similarly waived. *Kevorkian, supra* at 388 n 30.

her, and he threatened her with a gun. The trial court properly denied a directed verdict with respect to the assault charge.

Defendant also argues that the trial court erred in denying his motion to quash and amend the information with respect to the kidnapping charge. We may not review this issue because, as we have determined, defendant was fairly convicted of kidnapping at trial. "If a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover." *People v Wilson*, 469 Mich 1018, 1018; 677 NW2d 29 (2004).

Defendant next argues that the trial court erred in refusing to give jury instructions on aggravated assault and assault and battery. We agree that the trial court's failure to give an instruction on assault and battery was error; however, because the instruction was not supported by substantial evidence, the error does not warrant reversal.

We review claims of instructional error de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002), remanded on other grounds 467 Mich 888 (2002). A jury's verdict is presumed valid; therefore, the defendant bears the burden of showing that an instructional error was outcome-determinative. *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000). An instructional error is outcome-determinative if it undermined the reliability of the verdict. *People v Cornell*, 466 Mich 335, 363-364; 646 NW2d 127 (2002); *Rodriguez*, *supra* at 474. The reliability of a verdict is undermined if, considering the entire case, a lesser included offense instruction that was supported by substantial evidence was not given. *Cornell*, *supra* at 365. Conversely, the failure to give a lesser included offense instruction is harmless if the instruction was not clearly supported by substantial evidence. *Id*.

A defendant is entitled to an instruction on a necessarily included lesser offense if a rational view of the evidence would support it; however, a defendant is not entitled to an instruction on a cognate lesser offense. *Id.* at 357, 359. The trial court did not err in refusing to give an instruction on aggravated assault because aggravated assault is a cognate lesser offense of assault with intent to do great bodily harm less than murder. A cognate lesser offense is one that shares some common elements with and is of the same class as the greater offense, but also has elements not found in the greater. *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999). Aggravated assault contains an element not required for a conviction of assault with intent to cause great bodily harm less than murder. Indeed, to be found guilty of aggravated assault, the defendant must have actually caused the victim serious or aggravated injury, whereas evidence of actual injury is not necessary to convict a defendant of assault with intent to do great bodily harm less than murder. See MCL 750.81a and MCL 750.84.

The trial court did, however, err in refusing to give an instruction on assault and battery because assault and battery is a necessarily included lesser offense of assault with intent to do great bodily harm less than murder. A necessarily included offense is one that must be committed as part of the greater offense; it would be impossible to commit the greater offense without first having committed the lesser. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). Assault and battery is a necessarily included lesser offense because a defendant who is guilty of assault with intent to do great bodily harm less than murder necessarily first commits assault and battery. Simple assault is either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v*

Johnson, 407 Mich 196, 210; 284 NW2d 718 (1979). "[B]attery . . . is the willful touching of the person of another by the aggressor or by some substance put in motion by him; or, as it is sometimes expressed, a battery is the consummation of the assault." *Tinker v Richter*, 295 Mich 396, 401; 295 NW 201 (1940) (internal citation and quotation omitted).

The trial court's failure to instruct the jury on assault and battery does not warrant reversal, however. A lesser assault and battery instruction was not supported by substantial evidence, and no rational jury could have found defendant guilty of the lesser assault offense given the egregious facts of this case. Indeed, no rational view of the evidence would support a conclusion that defendant did not intend to do great bodily harm to Emmons.

Defendant next argues that the trial court improperly scored offense variable (OV) 3 and OV 10.

We review for an abuse of discretion a sentencing court's determination of the number of points to be scored for a particular sentencing variable. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *Id.* (internal citation and quotation omitted).

OV 3 was properly scored. Ten points are to be scored for OV 3 if the victim suffered bodily injury requiring medical treatment. MCL 777.33. Shortly following the beating, Emmons visited a hospital emergency room in which she was given an abdominal ultrasound, two "CT" scans, and X-rays of her jaw, chest, and pelvis to determine whether she suffered any internal injuries. She was given morphine and a prescription for Vicodin for pain. This constituted medical treatment.

We have reviewed the defendant's argument that OV 10 was improperly scored and we conclude that no basis for remand for resentencing exists.

Defendant next argues that his sentence is cruel and unusual in violation of the United States and Michigan Constitutions. Defendant claims that the trial court should have taken into consideration his background and rehabilitative potential in determining his sentence. However, we must affirm defendant's sentence under MCL 769.34(10), which provides, "[i]f a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." Furthermore, our Supreme Court has ruled that sentences falling within the recommended guidelines range are presumptively neither excessively severe or unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987).

Defendant next contends that if a single offender is convicted of multiple offenses, MCL 777.21(2) requires that the sentencing court compute a sentencing guidelines score for each offense, and because the court in this case did not do so for defendant's assault conviction, this Court should vacate his sentence for that conviction and remand for resentencing. Defendant is mistaken. MCL 777.21(2) states, "[i]f the defendant was convicted of multiple offenses, subject to section 14 of chapter IX, score each offense as provided in this part." Section 14 of Chapter IX is MCL 769.14, which states:

> Any person now incarcerated in any state prison, or on parole from a sentence thereto, who was sentenced under the terms of sections 10, 11, 12 or 13 of this chapter as in effect prior to the effective date of Act No. 56 of the Public Acts of 1949, shall be entitled to a review of sentence upon application to the court in which he was sentenced. Upon such application any judge of such court may vacate the previous sentence and impose any lesser sentence which in his judgment might have been imposed under sections 10, 11, 12 or 13 of this chapter, as amended by Act No. 56 of the Public Acts of 1949, had such sections as amended been in force at the date of the previous sentence imposed upon said prisoner: Provided, That any sentence so imposed shall be deemed to have begun as of the date of the previous sentence, and the rights of such prisoner under the laws shall be governed by the lesser sentence as then imposed.

MCL 727.21(2) requires that the sentencing court compute a sentencing guidelines score for each offense only for persons in the circumstances outlined in MCL 769.14. Because defendant did not fall within those circumstances, the trial court did not err in failing to compute a sentencing guidelines score for the assault conviction.

With regard to the kidnapping conviction, the court was required to complete a sentencing information report. Indeed, MCR 6.425(D)(1) requires the sentencing court to complete such a report and return it to the state court administrator not later than the date of sentencing. Here, while it appears that a report was prepared, it was not filed. We remand to allow for the filing of the sentencing information report. *People v Zinn*, 217 Mich App 340, 349-350; 551 NW2d 704 (1996).[3]

We affirm defendant's convictions and sentences. We remand for the ministerial task of filing the completed sentencing information report for defendant's kidnapping conviction. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Patrick M. Meter
/s/ Bill Schuette

[3] Defendant makes a brief argument that his sentence for kidnapping must be vacated based on *Blakely v Washington*, 542 US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree. *Blakely* does not affect Michigan's sentencing scheme. *People v Drohan*, 264 Mich App 77, 89 n 4 ; 689 NW2d 750 (2004).